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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-322

LOUIS VERNELL, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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RESPONSE TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

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In its Memorandum, the Government has apparently deemed it expedient to not only restate the facts, but to otherwise and unnecessarily, mis-state the same. Indeed, were the facts as represented by the Government, the Petitioner would *never* have proceeded with either his original appeal or with the Petition filed herein.

It is submitted, however, that properly presented, the facts in the case at bar appropriately bespeak the issue(s) raised in the petition filed and affirmatively demonstrate the constitutional infirmities of Petitioner's conviction.

Significantly, the record reflects the presence of at least two matters which, per se, could reasonably be regarded as sufficient to *negate* the charge of "wilfull" failure to file returns, i.e.:

> (1) That all of the subject returns were, in fact, filed, with taxes fully paid thereon, almost a year prior to the filing of Information (contrary to the Government's statement, the Petitioner never stipulated that his returns were filed "after the Treasury agents investigation had begun" (Page 2 of the Government's Memorandum). Indeed, the filing of Defendant's returns had nothing to do with the so-called "investigation").
>
> (2) During each of the subject years, the Petitioner made applications for extensions to file the required return(s) and except in one instance, the same were granted. (If, in fact, it ever was the intention of Petitioner to escape the necessity of filing, he would certainly not have sought additional time to do so and thereby "invite" closer scrutiny as to his tax status).

As reflected in the record, however, the situation presented in the case at bar is one of "*late*" filing, rather than "*non*"-filing. The record otherwise demonstrates a myriad of reasons and circumstances which could reason-

ably justify such "late" filing, i.e.: the repeated hospitalizations of Defendant's wife in "intensive care" facilities (T. 119); the loss and destruction of Defendant's records (T. 131, 133); Defendant's own ill health and hospitalization (T. 138); Defendant's extensive absence from the country (T. 147); the frequent relocations of Defendant's business (T. 132) and the pressures consequent to a 12-hour day, 7-day week practice (T. 116, 189-199).

In erroneously "condensing" the foregoing matters, the Government suggests in its Memorandum only *one* reason as appearing in the record for Petitioner's untimely filing of returns, i.e., that Petitioner "had been too busy trying to make money." The record reflects that such statement was not only contradicted by the Government witness presenting the same, but was further denied by the Petitioner as well. Further error in the Government's recitation of facts is reflected in its reference to the stipulation entered into prior to commencement of trial. Although the Government suggests that the Defendant had stipulated that he had *never* filed his returns, the record reflects that such stipulation referred only to his non-filing within the time specified in the Information. At all times during trial, the Government fully *acknowledged* the prior filing of all of Petitioner's tax returns and the payment in full of all taxes due thereon.

Albeit, one could not reasonably conclude from a proper recitation of the facts as evidenced in the record that the Defendant is a criminal, or that such facts would necessarily compel an adjudication of guilt as to the offense(s) charged.

It is significant to note that the statute circumscribing the subject offense, i.e., 26 U.S.C. 7203 prescribes that "wilfullness" is a necessary element thereof. In utter disregard of such statutory requirement, the Government's argument would necessarily require a change in the statute and in the place and stead of "wilfullness" the Government would substitute "intentional" as a requirement; such suggested change however, is a matter properly relegated to the Legislative rather than to the Judicial branch of Government.

Needless to state, there are a vast number of criminal statutes which do, in fact, require that a proscribed act be committed "with intent" or "intentionally". The tax related statutes, however, are explicit in their requirement of "wilfullness" as distinguished from "intention".

In recognizing such distinction, both this Honorable Court and the several Circuit Courts of Appeal have for the most part consistently required more than mere intent to sustain a tax conviction and have additionally required an element of mens rea. In *Bishop vs. U.S.*, (1973) 412 U.S. 346, L.Ed. 141, this court held, id at page 361:

> "The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers,"

Earlier, in *United States v. Murdock*, (1933) 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381, this Court formulated the requirement of wilfullness as "bad faith or evil intent".

In *Spies vs. United States*, 317 U.S. 492, 87 L.Ed. 418, 63 S.Ct. 364 (1943), this Court alluded to the expression "evil motive" in defining "wilfullness".

In like fashion, the courts of appeal have on innumerable occasions reflected similarly upon, and otherwise required, evil motive, bad faith, evil intent or other like expressions as an addition to the element of "intent" when defining wilfullness. *United States v Bengimina*, (8th Cir. 1974) 499 F.2d 117, *United States v. Klee*, 494 F.2d 398, *United States v. Vitiello*, (3rd Cir. 1966) 363 F.2d 240, *United States v. Palermo* (3rd Cir. 1958) 259 F.2d 872, *United States v. Mitchell*, 495 F.2d 285 (4th Cir. 1974), and *United States v. Tunnell*, (2nd Cir. 1973) 481 F.2d 149.

In *Mitchell*, (supra) the 4th Circuit Court of Appeals stated:

> "In so concluding, the court held that the 'instruction should have been granted since the crime charged required proof of willfulness — an element of fraud or bad faith.' "

Similarly, the 2nd Circuit Court of Appeals, in *Tunnell*, held:

> "As inferred by the Supreme Court from the words 'wilfully attempts' in the statute, the second and third necessary elements for conviction are evil motive by the defendant Tunnell and an affirmative act to carry out his scheme to evade tax. See 26 U.S.C. Sec. 7201 (1970); Spies v United States, 317 U.S. 492, 63 S.Ct. 364, 87

L.Ed. 418 (1943). See generally United States vs. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed. 2d 941 (1973)."

It is submitted that in order to sustain the argument of the Government in the case at bar, this Court would necessarily be required to approve the instruction given by the trial court which merely required the element of intent. Indeed, in utilizing such instruction, the trial judge specifically noted in the record that he was rejecting the pronouncements made by this Court in *Bishop* (T. 240-241).

Yet, and if nothing else, the Government's Memorandum serves to reflect the vital need for this Court to grant Certiorari in the within cause. It is accordingly noted that the Government has brought to the attention of the Court and this writer, the *en banc* decision of the 8th Circuit Court of Appeals which receded from its earlier decision which required reversal of the conviction entered.

Conflict is therefore apparent not only *between* the Circuits but *within* the circuits as well. *United States v. McCorkle*, (7th Cir. 1975) 511 F.2d 577, in which the 7th Circuit Court of Appeals originally reversed the conviction entered, only to recede therefrom in 511 F.2d 482; *United States v. Pohlman*, 510 F.2d 414, in which the 8th Circuit Court of Appeals, sitting en banc, similarly reversed the conviction and later receded from such decision while sitting en banc. 36 AFTR 2d 75-5642.

Clearly, in light of the foregoing, it would be difficult, if not impossible to present before this Honorable Court any similar matter of constitutional magnitude which

could reflect greater conflict or which could be more deserving of decisive attention by this Honorable Court.

In applying such principles to the case at bar, it is noted that the Information filed herein charges Petitioner with having failed to file on or before the specific date of April 15th during each of the subject years, whereas and by reason of the various applications made by Petitioner to extend the time for filing, there was, in fact, no lawful requirement that any of the subject returns be filed by such date. In this regard, the decision of *United States v. Goldstein*, (3rd Cir. 1974), 502 F.2d 526, 528, 530, (which is totally ignored in the Government's Memorandum), is deemed to be controlling.

Notwithstanding, the Government suggests that this Court should not consider such clear variance because of the erroneous interpretation placed by it on the stipulation entered into between the parties at trial and for the further suggested reason that the Petitioner did not provide the Government with an opportunity to amend the Information. Certainly, it is not the responsibility of one who is accused of a crime to do more than defend the specific charge made against him. However, the invalidity of such argument is further apparent in the record which reflects that the Defendant did, in fact, move for a judgment of acquittal on the specific ground of variance in the trial court prior to any appeal being taken (T. 27).

Although the facts in *United States vs. Figurell* (3rd Cir. 1972) 462 F.2d 1080 are conceded to be dissimilar to those present in the case at bar, nonetheless the principle of law is submitted as being the same. In *Figurell*, the 3rd Circuit Court of Appeals held that where time is a

specific element of the offense charged, a conviction could not be supported by showing the commission of such offense at a later date. Such principle was further considered and affirmed in *United States v. Richmond* (USDC 1961) 190 F.S. 889.

It is clear from the foregoing that the Government did not prove the specific offense(s) which it charged against the Petitioner in the Information. In accordingly deeming that the variance present in the case at bar cannot constitutionally support the conviction entered, the Petitioner prays that the same be vacated.

The Government's response to the second question raised by Petitioner is likewise deemed inappropriate. Indeed, the same constitutes virtually no response and wholly fails to address itself to the constitutional issues involved.

Notwithstanding that the government "glossed" over such question it is submitted to be a basic and fundamental part of due process and our system of justice that a conviction can only be entered upon evidence which supports the charge made. Ergo, a conviction cannot stand where the evidence adduced at trial does not support the particular offense charged.

In *Thompson vs. Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, this Honorable Court reflected upon the basic prerequisites of a conviction as follows:

> "Just as conviction upon a charge not made would be sheer denial of due process, so it is a violation of due process to convict and punish a man without evidence of his guilt."

Such principle was reaffirmed by this Honorable Court in *Johnson vs. Florida*, 391 U.S. 596, 88 S.Ct. 1713 (1968) and again in *Gregory vs. City of Chicago*, 394 U.S. 111, 22 L.Ed.2d 134, 89 S.Ct. 946. In the *Gregory* case, this Honorable Court, speaking through Chief Justice Warren, held:

> "As we said in *Garner vs. Louisiana*, 368 U.S. 157, 164, 82 S.Ct. 248, 251, 7 L.Ed.2d 207 (1961):
>
> It is as much a denial of due process to send an accused to prison following a conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction."

CONCLUSION

It is submitted that the Government has failed to suggest a lawful argument which could serve to preclude the proper granting of the Petition for Writ of Certiorari filed in the within cause. For the reasons herein and previously stated, it is urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

LOUIS VERNELL, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above was mailed this ____ day of December, 1975, to:

The Office of U.S. Attorney General
Washington, D.C.

LOUIS VERNELL, JR.